

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DUANE LEE SUMMERS,

Plaintiff,

v.

PAT GLEBE, GLEN DAVIS, JAMES
ALIF, DAN ANDERSON, BEV TISLER,
GINA WHITE, KEN THORNOCK,
DANIEL TAYLOR, SALLY THEISSON,
DAVID JENNINGS, CHARLES
BARROW, C ROHRER, D
MICHELBRINK, SHEPPARD, DAN
PACHOLKE, BRUNER, BURROUGH,
K MCTARSNEY, D ZIBERT, M
CALDWELL, TOM JOHNSON, JEANIE
MILLER-JACKSON, TAMARA J
ROWDEN, IDSO, LANOUE,

Defendants.

CASE NO. 3:15-cv-05102 RJB

ORDER:

- (1) DENYING MOTION TO
APPOINT COUNSEL;
- (2) ADOPTING REPORT AND
RECOMMENDATION; AND
- (3) DISMISSING CASE

This matter comes before the Court on United States Magistrate Judge J. Richard
Creatura's Report and Recommendation (Dkt. 6) and on plaintiff's Motion to Appoint Counsel

1 (Dkt. 7). The Court has considered plaintiff's motion, the Report and Recommendation and
2 objections thereto, and the file herein.

3 Plaintiff, a state prisoner proceeding *pro se*, filed a 42 U.S.C. § 1983 civil rights action,
4 alleging that (1) the named defendants wrongfully terminated him from his correctional
5 industries job at the Stafford Creek Corrections Center "with out due process or evidence"; (2)
6 some of the defendants slandered and defamed him by accusing him of dumping water on the
7 floor at his work area; and (3) one of the defendants retaliated against plaintiff, as allegedly
8 evidenced by the defendant's statement that "[he] did not want [plaintiff] to work for
9 Correctional Industries." Dkt. 5.

10 Plaintiff requests that the Court issue an injunction awarding him a "Labor and Industries
11 Certificate at proficiency as a [Computer Numerical Control] operator and programmer" (Dkt. 5,
12 at 4), the certificate he allegedly would have had the opportunity to earn had he not been fired
13 from the job. In addition, plaintiff requests that the Court award him damages, including
14 monetary damages for lost wages. Dkt. 5, at 4.

15 On February 23, 2015, Magistrate Judge Creatura issued a Report and Recommendation,
16 recommending that the Court dismiss plaintiff's action at screening for failure to state a claim
17 and revoke his *in forma pauperis* status on appeal. Dkt. 6.

18 More specifically, Magistrate Judge Creatura concluded that (1) plaintiff was not entitled
19 to due process for termination of his employment because he had no constitutional right to the
20 job; (2) plaintiff's retaliation claim fails as a matter of law because plaintiff has failed to show
21 that he engaged in any protected conduct; and (3) plaintiff's defamation and slander claim fails
22 as a matter of law because plaintiff's alleged injury was neither inflicted in connection with nor
23 caused the denial of any federally protected right. Dkt. 6.

1 In response, plaintiff argues that his “protected conduct and liberty interest” is the “state-
 2 created liberty interest in [receiving] the Labor and Industries certificate of proficiency”; that
 3 retaliation occurred when one of the defendants submitted a written statement recommending
 4 that plaintiff be terminated (Dkt. 1-1, at 10) and when plaintiff was allegedly denied access to the
 5 evidence pertinent to his termination; and that such a denial violated also his due process. Dkt. 8.
 6 In addition, plaintiff appears to assert a claim for “failure to investigate the staff misconduct.”
 7 *Id.*, at 3.

8 The Court has reviewed the record *de novo* and agrees with Magistrate Judge J. Richard
 9 Creatura’s analysis and conclusion, with the addition of the following analysis.

10 *a. Plaintiff’s due process claims*

11 A prisoner has no independent constitutional right to employment. *See Baumann v.*
 12 *Arizona Dep’t of Corr.*, 754 F.2d 841, 844 (9th Cir. 1985) (finding no constitutionally protected
 13 interest in a work furlough program). Accordingly, plaintiff may avail himself of due process
 14 protection only if the state has created a constitutionally protected interest in his correctional
 15 industries job by imposing substantive limitations on the exercise of official discretion. *See Id.*,
 16 at 841 (citing *Hewitt v. Helms*, 459 U.S. 460, 470–71 (1983)). The state must express these
 17 limitations in language of “an unmistakably mandatory character.” *Hewitt*, 459 U.S. at 471.

18 Here, plaintiff has failed to show that Washington State has created a constitutionally
 19 protected interest in his correctional industries job. RCW 72.09, the only statute plaintiff has
 20 cited, vests power in the Department of Corrections to provide for a comprehensive inmate work
 21 program. *See* RCW 79.09.100. This statute appears to grant the Department of Corrections broad
 22 discretion in providing inmates with employment. Plaintiff has failed to show that Washington
 23 State so substantively limits the exercise of the Department of Corrections’ discretion as to
 24

1 invoke any constitutional protection. Accordingly, plaintiff's due process claim fails as a matter
2 of law.

3 *b. Plaintiff's retaliation claim under federal law*

4 To establish a First Amendment retaliation claim, a prisoner must show that (1) a state
5 actor took some adverse action against the prisoner (2) because of (3) the prisoner's protected
6 conduct, and that such action (4) chilled the prisoner's exercise of his First Amendment rights,
7 and (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*,
8 408 F.3d 559, 567-68 (9th Cir. 2005).

9 Here, plaintiff has failed to show these five elements. In his complaint, plaintiff appears
10 to argue that retaliation, by way of termination, occurred because one of the defendants "did not
11 want" plaintiff to continue his employment. Plaintiff has not shown that he was engaging in any
12 protected conduct causing the allegedly adverse action.

13 In his objections, plaintiff appears to argue that one of the defendants retaliated against
14 him by refusing to provide plaintiff with the evidence pertinent to plaintiff's termination. Even if
15 this alleged retaliation was in response to plaintiff's complaints possibly falling under the
16 category of a First Amendment protected conduct, plaintiff has failed to show that such an
17 allegedly adverse action chilled his exercise of his First Amendment rights. In fact, since then,
18 plaintiff has filed numerous complaints. Dkt. 5, at 11-41, 59-64. Nor has plaintiff shown that
19 such an allegedly adverse action failed to reasonably advance any legitimate correctional goal.

20 Accordingly, plaintiff has failed to state a viable retaliation claim.

21 *c. Plaintiff's defamation/slander claim under federal law*

22 The Court agrees with the Report and Recommendation. Plaintiff has not shown that he
23 has a federally protected right to his correctional industries job. Accordingly, plaintiff cannot
24

1 claim, as a matter of law, that the alleged injury was inflicted in connection with, or caused the
 2 denial of, a federally protected right, the necessary elements of a § 1983 “defamation plus”
 3 claim. *See Crowe v. Cnty. of San Diego*, 608 F.3d 406, 444 (9th Cir. 2010) (citing *Herb Hallman*
 4 *Chevrolet v. Nash–Holmes*, 169 F.3d 636, 645 (9th Cir.1999)).

5 Plaintiff’s defamation and slander claim fails as a matter of law.

6 *d. Plaintiff’s failure to investigate claim under federal law*

7 To state a claim under § 1983, a complaint must allege (1) that the conduct complained of
 8 was committed by a person acting under color of state law; and (2) that the conduct deprived a
 9 person of a right, privilege, or immunity secured by the Constitution or the laws of the United
 10 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v.*
 11 *Williams*, 474 U.S. 327 (1986).

12 Here, plaintiff has failed to show that the defendants in question deprived him of a
 13 constitutionally protected right or privilege when they allegedly failed to investigate his
 14 termination. Accordingly, plaintiff has failed to state a viable § 1983 claim.

15 *e. Plaintiff’s state law claims*

16 To the extent that plaintiff’s defamation, slander, failure to investigate, or any other claim
 17 constitute state law claims, the Court should decline to exercise supplemental jurisdiction over
 18 such claims. Under 28 U.S.C. § 1367(c), a district court may decline to exercise supplemental
 19 jurisdiction over state law claims if (1) the claims raise novel or complex issues of state law; (2)
 20 the claims substantially predominate over the claim or claims the district court has original
 21 jurisdiction over; (3) the district court has dismissed all claims over which it has original
 22 jurisdiction, (4) in exceptional circumstances, there are other compelling reasons for declining
 23 jurisdiction. “While discretion to decline to exercise supplemental jurisdiction over state law
 24

1 claims is triggered by the presence of one of the conditions in § 1367(c), it is informed by the
2 values of economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d
3 999, 1001 (9th Cir. 1997) (internal citations omitted).

4 Here, the Court should dismiss all plaintiff’s claims over which the Court has original
5 jurisdiction for failure to state a claim. Accordingly, the Court should decline to exercise
6 supplemental jurisdiction over plaintiff’s state law claim, if any.

7 In sum, plaintiff’s complaint lacks merit.

8 **Leave to amend.** Pro se plaintiffs proceeding *in forma pauperis* must be given an
9 opportunity to amend their complaint unless it is “absolutely clear that the deficiencies of the
10 complaint could not be cured by amendment.” *Stanger v. City of Santa Cruz*, 653 F.2d 1257,
11 1257–58 (9th Cir.1980); *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.1980).
12 Magistrate Judge Creatura concluded that an amendment could not cure the deficiencies of
13 plaintiff’s complaint. Dkt. 6, at 5. As a result, Magistrate Judge Creatura recommended that, if
14 plaintiff fails to file an amended complaint before March 27, 2015, the Report and
15 Recommendation’s noting date, the Court should dismiss plaintiff’s complaint under 28 U.S.C. §
16 1915A for failure to state a claim. As of this date, plaintiff has filed no amended complaint.
17 Accordingly, the Court should dismiss plaintiff’s case for failure to state a claim.

18 **Plaintiff’s motion to appoint counsel.** Plaintiff requests that the Court appoint counsel
19 to represent him in this action. Under 28 U.S.C. § 1915(e)(1), the Court may request an attorney
20 to represent any person unable to afford counsel. However, the Court may appoint counsel in
21 exceptional circumstances only. *Franklin v. Murphy*, 745 F.2d 1221,1236 (9th Cir. 1984).

22 Here, plaintiff’s complaint lacks merit. In addition, plaintiff is able to able to articulate
23 and explain his position. This case does not present exceptional circumstances warranting an
24

1 appointment of counsel. Accordingly, the Court should deny plaintiff's motion to appoint
2 counsel.

3 ***In Forma Pauperis on Appeal.*** If plaintiff appeals this order and/or dismissal of this
4 case, this Court should revoke *in forma pauperis* status without prejudice to plaintiff to file an
5 application to proceed *in forma pauperis* with the U.S. Ninth Circuit Court of Appeals.

6 The Court, having reviewed Magistrate Judge J. Richard Creatura's Report and
7 Recommendation, and the remaining record, does hereby find and **ORDER:**

8 (1) The Court **ADOPTS** the Report and Recommendation (Dkt. 6).

9 (2) Plaintiff's complaint (Dkt. 5) is **DISMISSED** with prejudice.

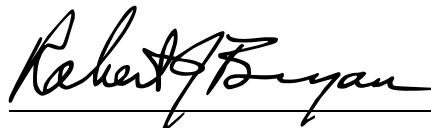
10 (3) Plaintiff's Motion to Appoint Counsel (Dkt. 7) is **DENIED**.

11 (4) If plaintiff appeals this case, *in forma pauperis* status is revoked without prejudice to
12 file an application to proceed *in forma pauperis* with the U.S. Ninth Circuit Court of
13 Appeals.

14 (5) The Court declines to exercise supplemental jurisdiction over any plaintiff's state law
15 claims.

16 (6) The Clerk shall direct copies of this Order to all counsel and to Magistrate Judge J.
17 Richard Creatura.

18 Dated this 2nd day of April, 2015.

19 

20 ROBERT J. BRYAN
21 United States District Judge
22
23
24